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May 19, 2005

Via e-mail & U.S. Mail

Ms. Joann Richmond
STATE BOARD OF EQUALIZATION
P.O. Box 942879
450 N Street, MIC 80
Sacramento, CA 94279-0080

Re: Customer Services and Administrative Efficiency Committee-
Rules of Practice-May 24, 2005 Meeting

Dear Joann:

This letter is written in response to the May 2, 2005 Interested Parties letter regarding the above referenced matter.

The Rules of Practice are very important as the Rules bring efficiency and order for all who participate in Board proceedings, including taxpayers. We were involved in the initial promulgation of the Rules with Don Hennessey as well as subsequent amendments. We are pleased that further refinement to the Rules are under consideration.

Improvement with regard to presentation time and scheduling of matters is greatly needed and we endorse the staff recommendations as set forth in the Interested Parties letter. The third item noticed, publication of Board decisions, is important for bringing certainty and precedent to Board proceedings. However we have some suggestions with respect to the determination of which cases warrant publication.

The California Rules of Court (Rule 978) provide guidance for requesting publication of an unpublished appellate opinion. Similar to current Board practice, Rule 978(a)(1) provides that any person may request that an unpublished opinion be published. This same rule provides a time frame in which the request must be made and delivered to the Court. In Section (b), a procedure is set forth as to recommendations and reasons for all parties on the appropriateness of publication. Lastly, Rule 976(c) provides standards for certification, i.e., whether the case establishes a new rule of law, applies an existing rule to a new set of facts, resolves a conflict in law, involves an issue of continuing public interest or makes a significant contribution to legal literature.

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It is our suggestion that the Rules of Practice be amended to provide for a similar set of rules and methodologies for publication of business tax cases, franchise/income tax cases and any other cases that are heard by the Board. It is important that all parties have input into the publication process like the Rules of Court provide and that there be definitive standards by which publication is determined. Lastly, there is no need to "reinvent the wheel" when the Rules of Court have been in existence in successfully guiding appellate publication process for so many years.

If you have any questions with respect to the foregoing, please feel free to get in touch with us. If you so desire, we are happy to be involved in the drafting of the rules.

Sincerely,

BEWLEY LASSLEBEN & MILLER-LLP



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attachment

Rule 970 adopted effective January 1, 1996.

DIVISION III. Rules for Publication of Appellate Opinions

Title 3, Miscellaneous Rules—Division III, Rules for Publication of Appellate Opinions;
Division adopted by the Supreme Court effective January 1, 1964.

Rule 976. Publication of appellate opinions

Rule 976.1. Partial publication

Rule 977. Citation of opinions

Rule 978. Requesting publication of unpublished opinions

Rule 979. Requesting depublication of published opinions

Rule 976. Publication of appellate opinions

(a) Supreme Court

All opinions of the Supreme Court are published in the Official Reports.

(b) Courts of Appeal and appellate divisions

Except as provided in (d), an opinion of a Court of Appeal or a superior court appellate division is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court.

(c) Standards for certification

No opinion of a Court of Appeal or a superior court appellate division may be certified for publication in the Official Reports unless the opinion:

- (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
- (2) resolves or creates an apparent conflict in the law;
- (3) involves a legal issue of continuing public interest; or

- (4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

(d) Changes in publication status

- (1) Unless otherwise ordered under (2), an opinion is no longer considered published if the Supreme Court grants review or the rendering court grants rehearing.
- (2) The Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order publication of an opinion, in whole or in part, at any time after granting review.

(e) Editing

- (1) Computer versions of all opinions of the Supreme Court and Courts of Appeal must be provided to the Reporter of Decisions on the day of filing. Opinions of superior court appellate divisions certified for publication must be provided as prescribed in rule 106.
- (2) The Reporter of Decisions must edit opinions for publication as directed by the Supreme Court. The Reporter of Decisions must submit edited opinions to the courts for examination, correction, and approval before finalization for the Official Reports.

Rule 976 repealed and adopted effective January 1, 2005.

Rule 976.1. Partial publication

(a) Order for partial publication

A majority of the rendering court may certify for publication any part of an opinion meeting a standard for publication under rule 976.

(b) Opinion contents

The published part of the opinion must specify the part or parts not certified for publication. All material, factual and legal, including the disposition, that aids in the application or interpretation of the published part must be published.

(c) Construction

For purposes of rules 976, 977, and 978, the published part of the opinion is treated as a published opinion and the unpublished part as an unpublished opinion.

Rule 976.1 repealed and adopted effective January 1, 2005.

Rule 977. Citation of opinions

(a) Unpublished opinion

Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on:

- (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel, or
- (2) when the opinion is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.

(c) Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When a published opinion may be cited

A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

Rule 977 repealed and adopted effective January 1, 2005.

Advisory Committee Comment (2005)

A footnote to the published version of former rule 977(d) stated that a citation to an opinion ordered published by the Supreme Court after grant of review should include a reference to the grant of review and to any subsequent Supreme Court action in the case. Revised rule 977 deletes this footnote because it is not part of the rule itself and the event it describes rarely occurs in practice.

Rule 978. Requesting publication of unpublished opinions

(a) Request

- (1) Any person may request that an unpublished opinion be ordered published.
- (2) The request must be made by a letter to the court that rendered the opinion, concisely stating the person's interest and the reason why the opinion meets a standard for publication.
- (3) The request must be delivered to the rendering court within 20 days after the opinion is filed.
- (4) The request must be served on all parties.

(b) Action by rendering court

- (1) If the rendering court does not or cannot grant the request before the decision is final in that court, it must forward the request to the Supreme Court with a copy of its opinion, its recommendation for disposition, and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court.
- (2) The rendering court must also send a copy of its recommendation and reasons to all parties and any person who requested publication.

(c) Action by Supreme Court

The Supreme Court may order the opinion published or deny the request. The court must send notice of its action to the rendering court, all parties, and any person who requested publication.

(d) Effect of Supreme Court order to publish

A Supreme Court order to publish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion.

Rule 978 repealed and adopted effective January 1, 2005.

Advisory Committee Comment (2005)

Subdivision (a). Former rule 978(a) required generally that a publication request be made “promptly,” but in practice the term proved so vague that requests were often made after the Court of Appeal had lost jurisdiction. To assist persons intending to request publication and to give the Court of Appeal adequate time to act, revised rule 978(a)(3) specifies that the request must be made within 20 days after the opinion is filed. The change is substantive.

Subdivision (b). Former rule 978(a) did not specify the time within which the Court of Appeal was required to forward to the Supreme Court a publication request that it had not or could not have granted. In practice, however, it was not uncommon for the court to forward such a request after the Supreme Court had denied a petition for review in the same case or, if there was no such petition, had lost jurisdiction to grant review on its own motion. To assist the Supreme Court in timely processing publication requests, therefore, revised rule 978(b)(1) requires the Court of Appeal to forward the request within 15 days after the decision is final in that court. The change is substantive.

Rule 979. Requesting depublication of published opinions

(a) Request

- (1) Any person may request the Supreme Court to order that an opinion certified for publication not be published.
- (2) The request must not be made as part of a petition for review, but by a separate letter to the Supreme Court not exceeding 10 pages.
- (3) The request must concisely state the person’s interest and the reason why the opinion should not be published.
- (4) The request must be delivered to the Supreme Court within 30 days after the decision is final in the Court of Appeal.
- (5) The request must be served on the rendering court and all parties.

(b) Response

- (1) Within 10 days after the Supreme Court receives a request under (a), the rendering court or any person may submit a response supporting or opposing the request. A response submitted by anyone other than the rendering court must state the person’s interest.